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Supreme Court of the United States

October Term, 1963

No. 935

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

against

CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, etc.,

Respondent.

MOTION AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.,
Attorneys for Transport Workers Union of America, AFL-CIO.

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Respondents.

MOTION

To the Honorable—

The Judges of the United States Supreme Court:

Comes now the Transport Workers Union of America, AFL-CIO, and respectfully shows this Court:

The Movant

(1) The Transport Workers Union of America, AFL-CIO, is a labor organization within the meaning of the Railway Labor Act and the National Labor Relations Act as amended, with 130,000 members who are employed,

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[1] In the Court of Appeals this case was heard together with litigation instituted by the Brotherhood of Locomotive Engineers (Ct. App. Nos. 18334). Movant understands that Petition for Certiorari will shortly be filed by the Brotherhood of Locomotive Engineers and it is sought by this motion to have this proposed brief in support of granting certiorari be deemed made with respect to that petition when and if filed.

among other things, on railroads and air lines, engaged in interstate and foreign transport, as well as local bus and rapid transit facilities, some of which are engaged in transport between or among two or more states.

2) The objects of the organization as stated in its International Constitution include (Article II, as follows:)

> "(b) To establish through collective bargaining adequate wage standards and retirement benefits, shorter hours of work and improvements in the conditions of employment for the workers in the industry.
>
> "(c) To promote legislation and to engage in such other activity as may be deemed necessary or advisable properly to safeguard the economic security and social welfare of working people and to protect and extend our democratic institutions, civil rights and liberties, and to perpetuate the cherished traditions of our democracy."

3. On motion duly made in the District Court of Appeals the movant was allowed, over the objection of the carrier-defendants, and on consent of the United States, to file its brief *amicus curiae* in that court, and said brief was filed and considered there.

The Nature of the Movant's Interest

4. The Transport Workers Union and its Railroad Division was not directly affected by the attempted changes in working conditions or working rules which led to the enactment of Public Law 88-108, the statute involved in these appeals. Obviously, however, a Union many of whose members are employed in commerce is directly concerned at the imposition of a solution upon others similarly situated.

5. The basic constitutional question and principle involved in the enactment and application of such a statute

is of direct and vital concern to the members of the Transport Workers Union, both as workingmen and as citizens of a free country. The preservation of collective bargaining in a free and democratic society and the protection of industrial democracy against the threat of corrosion and destruction are of the utmost importance to all the members of T. W. U.

Question of Concern to Movant

6. The applicant is concerned because the question of law of the greatest public importance necessarily presented by this case may be insufficiently stressed or omitted by petitioners, namely—

> whether a statute which provides for a Federal Agency or Commission with power to decree the wages, hours and working conditions of employees, without their consent and against their wishes, is within the competence and the constitutional power of the Congress of the United States?

Such a Commission or Agency has been established by Public Law 88-108, and while it is styled an "Arbitration Board", it is not in any true sense an *arbitration* board but is solely a regulatory and controlling agency as to terms and conditions of employment that does not depend or find source for its authority in the consent of the employees affected or their representatives.

7. The constitutionality of such an agency or commission has never been upheld by any court of the United States prior to the decisions of the courts below. It is of great concern to the Transport Workers Union of America and its members that the precedent implied in this case, granting congressional power to create an agency or commission such as described herein, should not be made by default.

Motion

8. Pursuant to Rule 42(1) of the Rules of this Court, the undersigned attorneys for Transport Workers Union of America, addressed an inquiry to the parties asking for written consent to the filing of a brief as *amicus curiae* herein. A written response was received from the United States Solicitor General, as attorneys for Respondents, et al., in which he consented. Attorneys for Petitioner and for the prospective petitioner in the *Locomotive Engineers'* case also consented. The attorneys for the carriers have declined to consent.

WHEREFORE, the undersigned respectfully prays this Court that the application of the Transport Workers Union of America, AFL-CIO to submit its brief *amicus curiae* in support of the Petition for Certiorari in the form and style submitted herewith, be granted.

March 25, 1964.

Respectfully submitted,

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.
Attorneys for Applicant, Transport Workers Union of America, AFL-CIO.

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CERTAIN CARRIERS, REPRESENTED BY THE EASTERN, WESTERN AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEE, etc.,

Respondents.

PROPOSED BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI [2]

Statement: The Court of Appeals of the District of Columbia, affirmed (with a dissent by Mr. Circuit Judge Wright on the substantiality of the constitutional question presented) a judgment of the District Court of the District of Columbia, Holtzoff, J., on cross motions for summary judgment in two actions to impeach and set aside an award of a so-styled "Arbitration Board."

Judge Wright did not, in his dissent, express his views on the constitutional questions, other than to say "It seems clear to me that the constitutional issues raised are substantial * * *." Nor did he identify those issues: petitioner's main thrust in the Court of Appeals, on the constitutional question, was on the issue of delegation of legislative power; the Transport Workers' Union urged in that court and renews here its position that the anom-

[2] The interest of the *amicus curiae* is set forth in its motion for leave to file this brief.

alous creature called "Compulsory arbitration" (a) is an unconstitutional deprivation of liberty [3] and (b) is, insofar as its effectuation is entrusted to the courts, an impermissible attempt to extend judicial power beyond the scope of "cases" or "controversies."

Question Presented

Whether the Congress of the United States has the power to create a regulatory agency, styled "Arbitration Board," which, without the consent of the employees affected, may render an award establishing the future terms and conditions of employment of employees on carriers in interstate commerce, by statute providing that the decree or award of such agency "shall be enforceable through such orders as may be necessary by any court of the United States".[4]

Reasons for Granting the Writ

While the phrase "compulsory arbitration" is nowhere mentioned in the statute involved, that phrase has been accepted by all parties and the courts below as a characterization or description of the procedure established by Public Law 88-108.

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[3] Movant emphatically does not agree with Petitioner (if the quoted phrase was intended as a concession) that "The fixing of terms and conditions of employment is a legislative process"—except as to *minimum* standards, for reasons of health or public safety. See especially, *infra*, pp. 13-14.

[4] Technically, it may well be that the sole question presented is whether the question stated is substantial enough to have required the convening of a three-judge court. In that connection, it is not without significance that counsel for the Carrier defendants submitted at the District Court level a separate fifteen-page "Memorandum on Behalf of the Carrier Defendants with Respect to the Constitutional Issues." Issues justifying so much attention by eminent counsel may, without more, be deemed substantial.

Actually it was recognized four decades ago that "compulsory arbitration" is a misnomer and a contradiction in terms. *Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U. S., at pages 564-5.

The very phrase "arbitration" in the meaning and content it has developed in our evolving industrial society, ever since collective bargaining became recognized as an essential constitutent element of that society, has been totally incompatible with compulsion.[5]

A classic statement of the case for voluntariness as an integral part of the character of labor arbitration was made by the dean of them all, Professor Shulman, in the document that was reflected in several facets of the *Steelworkers' Cases*, in 363 U. S. 564, 574, 593, *Reason, Contract and Law in Labor Relations*, 68 Harvard L. Rev. 999, 1016-1017:

> "A proper conception of the Arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties * * * to the extent that the parties are satisfied that the arbitrator is properly performing his part in their system of self-government, their voluntary cooperation in the achievement of the purposes of the collective agreement is promoted."

That conception was asserted in the *Steelworkers'* cases and reaffirmed in *Drake Bakeries, Inc.* v. *Local 50, Ameri-*

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[5] "Arbitration in the true sense is voluntary." *Updegraff & McCoy, Arbitration of Labor Disputes*, 1961, page 9.

"No one is under a duty to resort to arbitration unless by clear language he has so agreed": *Lehman* v. *Ostrovsky*, 262 N. Y. 130, 132.

"It begins with and depends upon an agreement of the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator": *Sturges*, "*Arbitration—What Is It*", 35 N. Y. U. L. Rev. 1031.

And see Goldberg *introduction*, Labor Arbitration—A Symposium, 37 N. Y. U. L. Rev. 350, 360: "The agreement to arbitrate * * * is not imposed on the parties, but is the product of their reasoned choice * * *."

can Bakery & Confectionery Workers, AFL-CIO, 370 U. S. 254, 256-7: "'[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"

This is more than mere semantics. Just as voluntary arbitration is a natural ally to and part of democratic collective bargaining, so compulsory or involuntary "arbitration" is antithetical to and incompatible with the collective bargaining process.

The Board whose award is now challenged on this appeal may have been referred to in the statute a number of times as a board of "Arbitration". That did not make it so. It is and was a Board for the *regulation* of contract terms between employers and employes. It is and was a Commission for the imposition on the parties of terms and standards to govern their future relations. However, as the court said in *Wolff Packing Co.* v. *Court of Industrial Relations*, 267 U. S. 552, 565: "Our present concern is with the essence of the system rather than its name", and so the self-contradictory and intrinsically meaningless phrase "compulsory arbitration" will be accepted for the balance of this proposed brief.

There is a further definition of terms which is the key to the distinction we wish to stress and the conclusion we wish to urge. That distinction was overlooked entirely below. It is the distinction between (a) the arbitration of *grievances*, that is disputes as to the meaning or application of existing agreements voluntarily entered into, and (b) arbitration of *future relations*, that is the promulgation by a third party of one or more of the terms and conditions of a prospective relationship.

There are, to say the least, "profound differences in the functions of grievance arbitrations and the arbitration of new contract terms", Givens, *Validity of Delayed Awards*, 16 Arb. J., 161, 178.

With respect to adjudication of grievances, even in the absence of an agreement to arbitrate, "compulsory" disposition by a third man is hardly offensive. Persons in a contract relationship ordinarily contemplate and may be held to have agreed that *some* tribunal be authorized to determine differences that arise during the life of the contract. In the ordinary course of events, in the absence of an agreement to arbitrate, a grievance dispute can well become the subject of a complaint for remedial or declaratory relief in a court of competent jurisdiction. Such a dispute clearly presents a case or controversy within the competence of a court.

When, however, a legislature, in order to relieve the burdens on its courts of general jurisdiction, or by agreement of the parties, creates a tribunal, for the adjudication of *grievance* disputes, that is neither outrageous nor incompatible with the bargaining process. That is almost precisely what was held (and *all* that was held) in *Brotherhood of Railway Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30. The review of the legislative history in Mr. Chief Justice Warren's opinion in *Chicago River* (353 U. S. 37-9) supports the view that the "compulsory" referral of grievance disputes involving the Brotherhood was, in effect, *voluntarily agreed upon by the labor organization.*

The elimination of collective bargaining by entrusting to a public Commission the task of dictating *future* economic terms and working conditions involves such a radical change in society as we know it, as to require for its authorization a constitutional amendment. Certainly it calls for the exercise of this Court's power of review when, *for the very first time in our history*, Congress has sought to establish a means of dictating to employers and employees what the terms of employment shall be.

A perceptive observer of the work of this Court has seen in *New York Times et al.* v. *Sullivan* (Nos. 39, 40, O. T. 1963)

a renewed demonstration of the "lesson * * * that we have a living Constitution, one able to meet new threats to a free society". (Mr. Anthony Lewis, March 11, 1964). Compulsory arbitration, albeit offered in a small dose, and disguised with a statutory recital that "prefers solutions reached through collective bargaining" (P. L. 88-108, Sec. 1, 5th "Whereas"), is a threat to our free society which must be measured against the Constitution.

It is the position of the Transport Workers Union that American constitutional freedom forbids industrial government by decree.

A.

To begin with, it can be pointed out that when the Constitution was written there were *no* mass production industries, *no* railroads, *no* mechanical means of interstate transportation, *no* national labor unions, *no* conception nor thought of collective bargaining or industrial democracy.

Our Constitution has repeatedly proved itself to be an instrument of government "made for an undefined and expanding future", *Hurtado* v. *California*, 110 U. S. 516, 530. Compare Reich, *Mr. Justice Black and the Living Constitution*, 76 Harv. L. Rev. 673, 735: "in a dynamic society the Bill of Rights must keep changing in its application or lose even its original meaning. There is no such thing as a constitutional provision with a static meaning."

Our industrial society developed far faster than the philosophy needed to recognize its injustices. In 1920, the then Chairman of the War Labor Board, Professor Felix Frankfurter, wrote in the *Yale Review*, decrying the industrial troubles which he believed due to "insistence of employers upon individual dealings with their men," and denying that unrest was "un-American."

> "Industrial unrest is bound to continue just so long as the present state of mind and feeling of work-

> ers is generated by growing disparity between their participation in politics and their exclusion from industrial direction" (*Law & Politics*, 1939, p. 213).

There began, then, four and one-half decades of evolving government interest in labor relations, during which Professor Frankfurter's exhortation was obeyed, and the fruit was described by Dean Shulman, 68 Harv. L. Rev. at 1002:

> "Collective bargaining is today, as Brandeis pointed out, the means of establishing industrial democracy as the essential condition of political Democracy, the means of providing for the workers' lives in industry the sense of worth, of freedom, and of participation that democratic government promises them as citizens."

Eminent authority has agreed that "collective bargaining is industrial democracy," and urged in opposition to a recently proposed "Court of Labor-Management Relations"—a tribunal to set labor conditions by decree—that this proposal may

> "be democracy's ultimate testing against alien society where the dictator's decree has no constraint upon it."

The speaker was the Hon. W. Willard Wirtz: the subject—the "Challenge to Free Collective Bargaining", the date—January 1963, as recorded at page 296, 308-9, at the proceedings of the 16th annual meeting of the National Academy of Arbitrators.

Secretary Wirtz has not been alone in this denunciation of "Compulsory Arbitration". The late Senator Taft said, in 1947;

> "The solution of our labor problems must rest on a free economy and on free collective bargaining. * * * but if we impose compulsory arbitration or if we give the government power to fix wages at which men must work for another year or for two years to come, I do not see how in the end we can escape a collective economy". (93 Cong. Rec. 3835, 3836).

This position was epitomized by the United States Chamber of Commerce in its statement:

> "Compulsory arbitration is incompatible with our democratic form of government. Such a conclusion follows naturally from the premise that free collective bargaining would fall into discard". (cited in Teller, *What Should Be Done About Emergency Strikes?* 1 Lab. L. J. 263, 272.

Some of these views were summarized in Van De Water, "*Involuntary Arbitration and National Defense,*" 18 Arb. J. 96, 100:

> "Involuntary arbitration is wholly inconsistent with the democratic freedoms and ideals which we cherish.
>
> "The end result of a system which begins with imposing compulsory arbitration is a system of totalitarian government.
>
> "The imposition of compulsory arbitration puts an end to free collective bargaining; for the parties will not seriously negotiate when they know their decision will be made for them".

It may be urged in defense of Public Law 88-108 and the estimable gentlemen who acted as the government representatives on the Board appointed thereunder that such broad and terrifying images cannot fairly be drawn concerning them or the issues on which they were called to pass, in view of the special and unusual history of the controversy that preceded the enactment of the law.

It is fair, in response, to quote from Mr. Justice Frankfurter's concurring opinion in *Youngstown Co. v. Sawyer*, 343 U. S. 579, at page 594:

> "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of the unchecked disregard of the restrictions that fence in even the most distinterested assertion of authority".

It is the position of this *amicus curiae* that in the context of our present industrial society and in recognition of the indispensability of free collective bargaining to our democracy, there should be recognized as part of the concept of "liberty of contract" an appropriate and meaningful content. This would be quite distinguishable from the synthetic "liberty" or misconception of liberty that prevailed among the generation of judges that decided such cases as *Coppage* v. *Kansas*, 236 U. S. 1; *Adkins* v. *Children's Hospital*, 261 U. S. 525; *The Court of Industrial Relations* cases, 267 U. S. 552, etc., and *Wilson* v. *New*, 243 U. S. 332.

Liberty of contract must be redefined in the present industrial context to mean that *free collective bargaining* has become one of the liberties protected by the Fifth Amendment and beyond abridgement by the Congress.

The question, then, is not whether the Congress has power to avert a crippling strike: it is whether it may do so by means destructive of liberty protected by the Fifth Amendment. In *Wilson* v. *New*, *supra*, it was not *held* that power to compel "arbitration" existed. It was casually remarked, in a *dictum* wholly unnecessary to the decision, but without presentation of the issue for adjudication.

The respondent United States below, on the Constitutional issue, relied mainly on *Wilson* v. *New*, *supra*, and other cases approving the fixing of *minimum* terms: a legislative proscription of sub-standard conditions. The setting in which the President's message, which resulted in the Adamson Act in 1916, was prepared, makes clear that it was a determination *only* of what was sub-standard that there concerned the Congress. The same distinguished contemporary observer, cited above, wrote in a letter to the Boston Herald on October 9, 1916 (Prof. Felix Frankfurter, see *Law & Politics*, 1939, p. 203):

> "Experience amply demonstrates that men, women and children work too long from the point of view of the quality of the resulting citizenship. The history of the lowering of standards of military

> requirement, the serious disclosure in England after the Boer War as to the deterioration of English factory workers, the testimony of General Gorgas— the most successful health administrator of the world— that poverty rooted in low wages and long hours is the greatest enemy to health, are all there to read for him who wants to be informed".
>
> * * * * therefore, the President was right in urging the 8 hour day was one that behind it 'judgment of society'. He was right in adopting that as a policy for legislative action".

A similar approach was reflected in the argument presented by the Solicitor General in *Wilson* v. *New*, as summarized at page 334 of 243, United States:

> "The efficiency and safety of railroad service depend upon the skill and physical fitness of the employees. It is just as necessary to properly care for employees as to keep in good condition the physical instrumentalities used in interstate commerce".

The injection of the idea of "compulsory arbitration" into the opinion in *Wilson* v. *New* may have been an effort to enlist Judges (compare the dissenting opinion of Mr. Justice McReynolds reported at pages 388-9 of 243 U. S.) whose concept of liberty was later rejected by a Court whose compassionate interpretation of the Constitution, to accommodate it to an industrial society, dates from about 1937.

The dictum on the subject of "compulsory arbitration" in *Wilson* v. *New* deserves no greater present vitality than the dictum of a few years earlier in *Plessy* v. *Ferguson*, 163 U. S. 537, on the subject of "separate but equal" accommodations.

The reconstruction of constitutional doctrine to meet the realities of a large-enterprise society and to build industrial democracy has been evident with respect to the *means* of securing organization of labor: picketing has been transformed from the "sinister name" of *American*

Foundries v. *Tri-City Council*, 257 U. S. 184, 205, to the constitutionally protected "liberty of communication" of *Thornhill* v. *Alabama*, 310 U. S. 88.

Collective bargaining, as the *end* secured by the organization of labor, must be as securely protected from encroachment as picketing and leaflet distribution, the *means* of securing such organization.

The commerce power which had so narrow a scope in the era of *Wilson* v. *New*, extends now to the food a farmer grows to feed his animals, *Wickard* v. *Filburn*, 317 U. S. 111. The due process protections of the Fifth Amendment must be available to prevent that pervasive power from obliterating the genuine, meaningful "liberty of contract" that collective bargaining has come to be.

B.

Another basis for constitutional proscription of the statutory scheme of Public Law 88-108 is found in Article 3, Section 2, of the Constitution, limiting the jurisdiction of courts to "cases" and "controversies".

The statute provides not only for the filing of the "award," as a purported award under the Railway Labor Act, in the United States District Court for the District of Columbia; it also provides in Section 7(b) that *all* of the obligations imposed by the Joint Resolution

> "Upon suit by the attorney general, shall be enforceable through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties".

Those obligations include refraining from changing or proposing to change rates of pay, rules or working conditions, or from engaging in any strike with respect thereto, or from disobeying, after it is rendered, the decree or award of the Board for the determination of working conditions.

Thus, the judicial power of the United States is employed and meshed in the web of "contract draftsmanship". That is, the drafting and enforcing of prospective terms and quasi-legislative writing of standards of railway labor relations, becomes intertwined with the procedures of the federal courts. Cf. *Boston Printing Pressmen's Union* v. *Potter Press*, 141 F. Supp. 533, aff'd 241 F. 2d 787, C. D. 353 U. S. 217.

In that case Judge Wyzanski pointed out the distinction we have stressed above between a *grievance* arbitration and a *future relationship* arbitration and construed the United States Arbitration Act as not having been intended to embrace the latter. He thereby avoided the necessity of deciding whether the requirements of Article 3, Section 2 of the Constitution "preclude Congress from conferring upon courts the power to enforce a quasi-legislative arbitration program". He did point out:

> "this court deems it undesirable to jump into what may be a bottomless pit of dispute over future working conditions. Perhaps, on reflection, no one would be happy to have judges again exercising quasi-legislative magistracy over labor problems of uncertain dimensions."

In commenting on Judge Wyzanski's decision in 58 *Northwestern Law Review*, at page 562, n. 26, it was observed that it was regrettable that the constitutional question was not explored further:

> "The non-justiciable, or non-quasi judicial character of these disputes might prevent them from being considered 'cases or controversies'."

See also, concurring opinion, *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 594:

> "Judicial power can be exercised only as to matters that were the judicial concern of the courts of Westminister, and only if they arise in ways

that to the expert feel of lawyers constitute 'cases' or 'controversies.'"

As was said in *Matter of Buffalo & Erie R. R. Co.*, 250 N. Y. 275, 278:

> "No power exists in the courts to make contracts for people."

We respectfully submit that decreeing the terms and conditions of employment without the consent and against the will of the parties, to be operative for the future, cannot constitutionally be the subject of a proceeding as intricately interrelated with court procedures as that of the Agency-Board-Commission that acted below. Compare *Keller* v. *Potomac Electric Co.*, 261 U. S. 428 and *Radio Commission* v. *G. E. Co.*, 281 U. S. 464.

If, as Judge Wyzanski concluded, the Constitutional question he faced was substantial enough to require a particular statutory interpretation, it is substantial enough to call for review by this Court.

C.

The vital public interest in the preservation of free, democratic, collective bargaining is a constitutionally protected interest as well. Certainly, constitutional questions that are raised for the first time as to validity of the process of labor-relations-by-decree, established in P. L. 88-108, are substantial enough to have deserved consideration by a three-Judge Court.

It is especially striking that the occasion for the Congressional innovation of a dictated and imposed solution relates to a dispute about the very survival of employment itself. Shall men be deprived of the opportunity to bargain about and defend themselves against being cast into the "other America" of poverty and deprivation?

> "It is one thing to bargain about terms and conditions of employment and quite another to bar

gain about terms of unemployment, about the conditions on which men are to yield their jobs to machines."

So said Secretary Wirtz to the National Academy of Arbitrators (op. cit. *supra*) and we concur.

It is respectfully submitted that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

PAUL O'DWYER,
HOWARD N. MEYER,
50 Broad Street,
New York 4, N. Y.,
Attorneys for Transport Workers Union of America, AFL-CIO.